



POLICE DEPARTMENT

September 21, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Saher Abumalouh
Tax Registry No. 936093
46 Precinct
Disciplinary Case No. 85071/09

The above-named member of the Department appeared before me on May 24, 2010, charged with the following:

1. Said Police Officer Saher Abumalouh, assigned to the 46th Precinct, on or about February 15, 2009, while off-duty and at a location known to this Department, in Yonkers, New York, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer was involved in a physical altercation with an individual, identity known to the Department. (As amended)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

The Department was represented by Rita Bieniewicz, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Lieutenant William Burnicke as its sole witness.

Lieutenant William Burnicke

Burnicke, a 20-year member of the Department, is currently assigned to the Bronx Investigations Unit. On February 15, 2009, he responded to Yonkers Central Booking after receiving notification that the Respondent had been involved in an off-duty physical altercation and was arrested by members of the Yonkers Police Department. Burnicke was subsequently informed by a Yonkers police captain named Barker that the Respondent and seven other individuals had been arrested after an altercation in a mosque. The men were meeting in the mosque to discuss a dispute that had taken place a couple of days earlier involving the Respondent's brothers. Barker told Burnicke that the meeting turned violent after the Respondent supposedly bit his hand, which is a disrespectful gesture in Muslim culture, and slapped his hand three times on a table in an antagonizing manner. Burnicke took photographs of the Respondent that day. The Respondent had slight bruising on his back and the right side of his face. [Department's Exhibits (DX) 1A through E are photographs of the Respondent's back and face, taken by Burnicke on the day of the incident.]

Over the course of the following month or two, Burnicke attempted to interview all of the men who had been arrested at the mosque. The interviews were conducted on the telephone. In an interview with [REDACTED], [REDACTED] informed Burnicke that he was at the mosque to mediate an argument that had occurred two days earlier between his

son and the Respondent's brothers. [REDACTED] told Burnicke that during the mediation the Respondent bit his own hand, slapped his hand on a table, slapped himself in the face, and then said, "Hit me here." Of the seven men arrested, two [REDACTED] and [REDACTED] [REDACTED] refused to cooperate with Burnicke's investigation. The investigation resulted in a determination that the Respondent's involvement in the altercation at the mosque rose to the level of misconduct. When asked to explain this determination, Burnicke stated, "[The Respondent] made physical contact with other individuals involved in the altercation. He made actual physical contact." Although other people involved in the altercation also sustained injuries, none of them specifically claimed that their injuries were caused by the Respondent.

On cross-examination, Burnicke testified that [REDACTED] informed him that a group of individuals who were not supposed to be at the mediation appeared at the mosque during the February 15, 2009 meeting. These individuals appeared mean and angry and "didn't look like they were coming for peace." The Respondent has always denied biting his hand in the manner described by [REDACTED]. Several of the people that Burnicke interviewed corroborated the Respondent's version of events. The Respondent told Burnicke in an interview that he was trying to crawl out of the mosque, where chairs were flying and people were stepping on his back. Burnicke stated that there was no evidence that the Respondent punched anybody. Had Burnicke observed injuries to the Respondent's hands, he would have taken photographs of them. The injuries that were photographed were consistent with blows to the face and back.

The investigation showed that the Respondent called 911 during the altercation. The Respondent, who was standing outside when the police arrived, identified himself as

a member of the service. The fight was still taking place inside, and the Respondent told the police officers that he wanted certain people inside to be arrested. When the officers went inside to break up the fight, there were people inside who wanted the Respondent arrested also. Both sides in the altercation were claiming injury, and [REDACTED] claimed that the Respondent kicked and punched his son. Burnicke did not know how the responding officers determined who would be arrested. All eight men who were arrested, including the Respondent, ultimately had their cases dismissed. The Respondent was found to be cooperative, polite, and fit for duty at the time of his arrest.

The Respondent told Burnicke that he was attacked. Burnicke conceded that if that were the case, the Respondent would have been justified in using force to defend himself.

On redirect examination, Burnicke testified that to his knowledge none of the other individuals involved in the altercation had obvious signs of injury on their hands. This fact did not lead Burnicke to believe that an altercation never occurred. All of [REDACTED] [REDACTED]'s relatives corroborated [REDACTED]'s statement about the Respondent biting his hand and slapping the table.

On recross-examination, Burnicke testified that the Respondent also told him about individuals who appeared at the mediation uninvited. Burnicke was unable to make contact with these individuals during the course of his investigation.

Upon questioning by the Court, Burnicke stated that his investigation resulted in a determination that the Respondent "was involved in a physical altercation as the aggressor in throwing punches or kicking, it was alleged that he punched and kicked another individual numerous times."

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent, a five-and-a-half-year member of the Department, is currently assigned to the 46 Precinct. On February 13, 2009, he went to the mosque that he has regularly attended since its opening in 2002 or 2003. While he was playing soccer at the mosque that day he noticed his 17-year-old brother about to get into a fight with [REDACTED]'s teenage son, [REDACTED]. The Respondent grabbed his brother away and told him to relax. Because of animosity between the Respondent's family and [REDACTED]'s family, a mosque board member arranged for the two families to come together and discuss the issue. The meeting was to take place at the mosque and was to be led by a clergyman.

On February 15, 2009, the Respondent attended the meeting with his father, three uncles, two brothers, and a cousin. [REDACTED] attended with several other men. While the group waited for [REDACTED] to arrive, there was no hostility among them. When [REDACTED] appeared, he was accompanied by eight to ten men, who were between the ages of 18 and 25 and dressed inappropriately for a mosque. The Respondent had never seen these individuals inside the mosque before. He testified, "Once they arrived, basically the environment changed a little bit. They came in and they were just looking at my brothers and me." The Respondent suddenly felt like he had been "setup." When the Respondent's brother and [REDACTED] began to argue, the Respondent stopped the argument to prevent the situation from becoming aggravated. [REDACTED], however, suggested that the

teenagers be allowed to fight. When the Respondent realized that [REDACTED] was not interested in a peaceful mediation, he decided to leave the room. Before he could exit, though, somebody punched him on the right side of the face from behind. The Respondent stated, "Then I just looked to my left and a stampede of guys that were sitting to my left just attacked." He tried to get out of the room, but [REDACTED] was standing in the way. At one point, the Respondent fell to the floor and was struck on the back with a chair. He was eventually able to crawl out of the room. He then called 911 and reported to the operator that he had just been assaulted and that his father and brother were still in the midst of an altercation. The Respondent waited outside the mosque for the police to arrive.

Yonkers police officers arrived approximately five minutes later, and the Respondent identified himself to them as a member of the service. The responding officers went into the mosque and broke up the fight. After the Respondent identified his attackers to the police, several of the men counter-complained that they had been assaulted by the Respondent and members of his family. The police ended up arresting four members of the Respondent's family and four members of [REDACTED]'s family. All of the criminal cases were ultimately dismissed. As a result of the incident, the Respondent was suspended for 23 days and spent two months on modified duty status.

The Respondent testified that at no point during the altercation did he slap a table three times or bite his hand. He stated that hand-biting is not a gesture he is familiar with, and he did not know that it signifies a desire to fight. The Respondent never initiated physical contact. At no point did he kick or punch anybody.

On cross-examination, the Respondent testified that he did not expect the meeting to be hostile since there were adults present and a clergyman was mediating. The meeting turned violent two or three minutes after [REDACTED] arrived. At that point, there were 25 or 30 people in the room. One of the men told [REDACTED] that he was going to "F [him] up and then . . . F up [his] brother the cop." The Respondent never met [REDACTED] before that day. The Respondent never heard of a fight taking place in the mosque before. As a result of the altercation, he sustained a little bruising but nothing serious. He did not seek medical treatment.

The Respondent testified that he might have pushed [REDACTED] in his attempt to get out of the room. The Respondent's cousin was the only member of the family to seek medical attention. When asked if there was any reason he did not want to press charges against the people who assaulted him, the Respondent replied, "Because basically they fabricated a story . . . that I did whatever I did, and I figured if I was arrested that night, I don't know what it is going to lead to especially with my job, I figured I just wanted to get it over with and just be on my way."

On redirect examination, the Respondent stated that while he arrived at the mosque with seven relatives, [REDACTED] arrived with only two. The Respondent believed that they were there to talk. The Respondent's father is 53 years old, and his uncles who were there were elderly. There was no hostility or tension until [REDACTED] appeared.

FINDINGS AND ANALYSIS

The Respondent stands charged herein with engaging in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: said Police Officer was

involved in a physical altercation with an individual, identity known to the Department. The Respondent is found Not Guilty. The Department presented this hearsay case through a hearsay witness who conducted telephone interviews of four potential witnesses against the Respondent, in essence double hearsay. None of the witnesses who made allegations against the Respondent appeared in this forum to testify.

Lieutenant William Burnicke testified that on February 15, 2009, the Respondent and seven other people were arrested by the Yonkers Police Department for being involved in a physical altercation at a Yonkers mosque. Because of the arrest, Burnicke stated that he responded to Yonkers Central Booking and he informally interviewed Captain Barker of the Yonkers Police Department. The Respondent was subsequently suspended and his firearm, shield and identification card were removed. Since the Respondent had a pending criminal case, he was not interviewed on the night in question. Photographs, however, were taken of the Respondent's condition, which allegedly showed bruising to his lower back and the right side of his face.¹

Burnicke prepared a report for the New York City Police Department duty captain. He attempted to interview seven people involved in the altercation, five of whom were interviewed, two months later, over the telephone. These interviews did not include the Respondent. The seven people represented people from the Respondent's family as well as people from the other family involved in the incident. Burnicke attempted to personally interview two people who resided in the Bronx, [REDACTED] and [REDACTED] two brothers, but when he arrived at their home, they refused to be interviewed.

¹ Photographs were marked for identification Department Exhibits 1 A through E, but they were not offered in evidence.

Burnicke did informally interview Barker who stated that on Friday, February 13, 2009 a fight broke out between the Respondent's brothers and another Muslim family. It was decided that the two families, including the Respondent, would meet at the mosque on Sunday, February 15, 2009 [the incident date], in an attempt to mediate the dispute. It was alleged that during the mediation, the Respondent bit his hand in a gesture of disrespect in the Muslim culture as well as slapped his hand three times on the table instigating a fight and at which time, a fight broke out.

Burnicke also interviewed [REDACTED]² [REDACTED] stated in sum and substance that on Friday his son and the Respondent's brothers had a fight of unknown origin. A mediation was scheduled for Sunday between the families to avoid future problems. He alleged that the Respondent bit his hand and slapped himself in the face and said words to the effect, "Hit me here." An altercation ensued in which the Respondent, [REDACTED] and others were all involved. Burnicke testified that he concluded that the Respondent was involved in the physical altercation. Although one individual complained of an injury to the head and another individual complained of pain about the body, Burnicke testified that no one specifically claimed that the Respondent caused any injury or pain to another person. Burnicke concluded that since the Respondent was involved in the altercation it was possible he engaged in the altercation and subsequent injury to persons present. The Court disagrees with this conclusion. Seven other people were in the room when the melee ensued. Chairs were flying and any person could have been injured by throwing a chair, being hit by a chair or a punch. This conduct could not be attributed to the

² It must be noted that this proceeding was adjourned from April 21, 2010 to this date based on a statement from [REDACTED] that he had a death in his family and needed an adjournment. Case was rescheduled for May 24, 2010 but [REDACTED] absented himself from the adjourned proceeding.

Respondent without some level of proof. The veracity of any witnesses to the melee could not be established in this Court apart from the testimony of the Respondent.

Burnicke acknowledged during his testimony that [REDACTED] stated that when the mediation was set up, some individuals entered the room that were not expected to be there. They were men who either worked for him or knew his brother and they looked "mean." He described them as "not coming for peace and looked very angry." Burnicke also acknowledged that during the Respondent's official Department interview he stated that during the mediation, a group of individuals not affiliated with the mosque entered the room and looked like they were there to start trouble. The Respondent said the individuals appeared to grow up in the United States and were unfamiliar with Muslim culture. Burnicke agreed that the Respondent's account corroborated what [REDACTED] had stated.

Burnicke also acknowledged that when he refreshed his recollection looking at the photographs of the Respondent he would say his injuries were consistent with a blow to the face and the back. He said they were also consistent with the Respondent's account that he crawled out of the room where chairs were flying and people were stepping on his back, all in an effort to get out and to call the police. He agreed that the Respondent did not have any injuries to his hands, such as bloody knuckles, to suggest that he punched anyone.

Burnicke acknowledged the Respondent called the police, met Yonkers Police outside the mosque, and identified himself as a police officer. Burnicke also admitted that a Fitness for Duty Report was prepared for the Respondent by the duty captain who responded to the scene and the Respondent was found to be fit for duty, cooperative and

polite. Burnicke also admitted that he interviewed family members of the Respondent and all of them denied that the Respondent bit his hand or slapped his hand on the table during the mediation. Burnicke said that the Respondent denied such conduct.

The Court is faced with a hearsay “he said she said” type of case. The problem is, none of the accusers against the Respondent bothered to appear at this proceeding. The Respondent did not ask for the mediation, it was suggested by the Imam or spiritual leader at the mosque. It does not seem from the facts of this case that the Respondent really wanted a fight because he showed up to the mediation with his father and uncle, two individuals older than himself who likely would not fare well in a fight with the Respondent, his two younger brothers and the other family’s younger brother and their young friends who showed up at the mediation. It appears from the facts that the Respondent came to the mosque to mediate the inter-family dispute. The Respondent testified that he crawled out of the room and called the police which brought attention to the fact that an altercation occurred. If the Respondent provoked the altercation, it is unlikely that he would be the one to call the police to the scene to break up the incident.

The Assistant Department Advocate (Advocate) argues that because four of the opposing family members allege that the Respondent bit his hand and struck the table with his hand, that he precipitated the melee that ensued. The Advocate further alleges that because the Respondent was in the room and did not leave before the physical altercation ensued, he is also guilty of misconduct. The Court disagrees.

The Respondent denied at all times that he engaged in the preceding gestures alleged. He denied it in his official Department interview according to Burnicke, and he denied it when he testified at trial. His family also denied it when interviewed by

Burnicke. Even if the Respondent made the gestures, i.e., bit his hand, struck his face or struck the table, there is no testimony that he threw the first punch which likely led to the physical altercation. In fact, evidence suggests that it was the “mean” youngsters who were “not looking for peace and looked very angry” who likely started the altercation. In addition, there are inconsistencies in the hearsay as to what occurred. [REDACTED] said the Respondent slapped his own face and prodded the people to hit him in the face. Barker’s double hearsay account was that the Respondent allegedly slapped the table three times. Thus the hearsay itself is not reliable.

The Respondent came in and testified and the Court was able to assess his credibility and he was found to be a credible witness. He testified that when the melee began, he was punched in the face, dropped to the floor and attempted to crawl out of the room while being stepped on as he made his way to the door. Once at the door, someone attempted to block his exit, so he may have pushed that person out of the way. He denied ever slapping or punching anyone. Once out of the room, the Respondent called the police, leaving his father, uncle and brothers still in the room as the melee continued. This was corroborated by the Yonkers police captain who stated that upon the arrival of Yonkers Police, the Respondent was outside. Thus the Respondent left the room when the altercation ensued. He did not stay in there and fight until the police came and took him away.

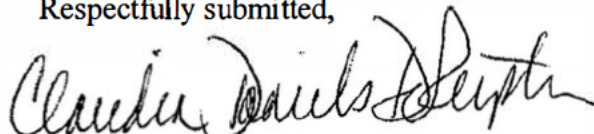
All parties at the scene were arrested irrespective of what role they played in the altercation. Later, all charges were dropped against all parties and the Respondent was suspended for a total of 23 days. Thus the criminal case against him must have been

dismissed within 30 days. In addition, none of the other family members allege that the Respondent punched or hit them.

The hearsay testimony alleging that the Respondent was involved in a physical altercation involving seven other people without evidence of his actual participation does not establish that he engaged in misconduct by a preponderance of the credible evidence. In fact, there is no credible evidence to establish that fact at all. All that can be established was that he was present when the altercation broke out and his mere presence in the room, in and of itself does not amount to misconduct. Action taken by the Respondent was to get away from the altercation, call for help and wait for the police to arrive which was the best he could have done given the circumstances.

Accordingly, I find the Respondent Not Guilty and recommend that the Respondent be credited the 23 suspension days previously forfeited in this matter.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials

APPROVED
NOV 30 2010

RAYMOND W. KELLY
POLICE COMMISSIONER